Supreme Court, U. S.
FILED
SEP 9 1980
MICHAEL RODAK, JR., CLERK

No. 79-1344

In the Supreme Court of the United States

OCTOBER TERM, 1979

MICHAEL M., PETITIONER

v.

THE SUPERIOR COURT OF SONOMA COUNTY,
THE PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether California Penal Code § 261.5, which prohibits a male from having sexual intercourse with a female under age 18 who is not his wife, violates the Equal Protection Clause of the Fourteenth Amendment.

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INTEREST OF THE UNITED STATES

This case raises the question whether carnal knowledge or statutory rape provisions that are not gender neutral unconstitutionally discriminate on the basis of sex. Like the California provision at issue here, the federal carnal knowledge statutes prohibit a male from having sexual intercourse with an underaged female not his wife; females are not prohibited from having sexual intercourse with an underaged male. See 18 U.S.C. 1153, 2032; D.C. Code § 22-2801 (Supp. I 1974). Thus, although the age limitation in the federal statutes is two years lower than the age limitation in the California statute (under 16 versus under 18), petitioner's contentions in this case may draw into question the constitutionality of the federal statutes, which have recently been declared facially unconstitutional by the Ninth Circuit. See *United States* v. *Hicks*, No. 78-2534 (Apr. 16, 1980).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall * * * deny to any person within its jurisdiction the equal protection of the laws.

Cal. Penal Code § 261.5 (West 1973) provides:

> Unlawful sexual intercourse is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years.

Cal. Penal Code § 264 (West 1973) provides in pertinent part:

> Unlawful sexual intercourse, as defined in Section 261.5, is punishable either by imprisonment in the

> county jail for not more than one year or in the state prison * * *.

18 U.S.C. 1153 provides, in pertinent part:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, * * * carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, * * * shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 U.S.C. 2032 provides:

> Whoever, within the special maritime and territorial jurisdiction of the United States, carnally knows any female, not his wife, who has not attained the age of sixteen years, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense, be imprisoned not more than thirty years.

STATEMENT

1. In July 1978, a complaint was filed in the Municipal Court of Sonoma County, California, alleging that petitioner, then a 17½-year-old male, had had unlawful sexual intercourse with a female under the age of 18, in violation of Cal. Penal Code § 261.5 (West 1973).[1] The evidence adduced at a preliminary hearing showed that at approximately midnight on June 3, 1978, petitioner and two friends approached Sharon, a 16½-year-old female, and her sister as they waited at a bus stop. Petitioner and his friends invited Sharon and her sister to drink some wine with them, and, after a short conversation, both Sharon and her sister agreed to accompany

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[1] Petitioner had initially been charged in the Supreme Court of Sonoma County as a juvenile, in violation of Cal. Welf. & Inst. Code § 602 (West Supp. 1980), but had been found unfit for treatment as a juvenile (J.A. 3). See Cal. Welf. & Inst. § 707(a) (West Supp. 1980). Subsequent references to Cal. Penal Code § 261.5 are to the current codification. (The amendment of that Section after the complaint was filed has no bearing on the issue in this case.)

the three males to a nearby railroad track. Thereafter, petitioner and Sharon, who had already been drinking, moved away from the others to some nearby bushes where they began to kiss. Subsequently, after Sharon's sister and petitioner's friends had left, petitioner and Sharon began kissing on a park bench. Petitioner then told Sharon to take off her pants. When Sharon refused and tried to get up, petitioner struck her in the face several times. At that point, Sharon submitted to having sexual intercourse with petitioner (J.A. 3-4, 7-8, 19-23, 26, 32-33).[2]

On July 27, 1978, respondent State of California formally charged petitioner with violating Section 261.5 in a one-count information filed in the Superior Court of Sonoma County (J.A. 7-8). At his arraignment that same day, petitioner moved to set aside the information on both state and federal constitutional grounds, asserting that Section 261.5 unlawfully discriminated on the basis of gender. The trial court denied this motion, but prior to trial petitioner sought a writ of prohibition from the California Court of Appeals (J.A. 2-5). On September 14, 1978, the Court of Appeals summarily denied petitioner's request for relief (*id.* at 9).

2. Petitioner then sought review in the Supreme Court of California. A divided Supreme Court rejected petitioner's claim that the California unlawful sexual intercourse statute violated state and federal equal protection principles (Pet. App. A-1 to A-24). The court first stated that "section 261.5 discriminates on the basis of sex because only females may be victims, and only males may violate the section" and that therefor the State must demonstrate that the statute's classification furthers a *compelling* governmental interest (Pet. App. A-2 (emphasis supplied)). The court found that the gender classification at issue here "is supported not by

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[2] Petitioner did not present any evidence at this preliminary hearing, although his counsel did extensively cross-examine Sharon.

mere social convention but by the immutable physiological fact that it is the female exclusively who can become pregnant" (Pet. App. A-3). Canvassing "the tragic human costs of illegitimate teenage pregnancies"—including the large number of illegitimate births and teenage abortions, the increased medical risks associated with teenage pregnancies, and the social consequences of teenage childbearing—the court concluded that the State has a compelling interest in preventing such pregnancies (*id.* at A-3 to A-5). Because males alone can "physiologically cause the result which the law properly seeks to avoid," the court further held that the gender classification was readily justified as a means of identifying offender and victim (*ibid.*).

The court also rejected petitioner's contentions that the statute is both overbroad and underinclusive. With regard to petitioner's claim that the statute is overinclusive because it applies to sexual intercourse involving birth control devices or persons otherwise incapable of procreation, the court observed that such defenses would entail difficult, if not insurmountable problems of proof, particularly in the case of a young prosecutrix (Pet. App. A-5 to A-6). The court also pointed out that contraceptives are not fail-safe (*id.* at A-6).

Likewise, the court concluded that the statute is not impermissibly underinclusive. Noting that minor females are by definition subject to risks and adverse consequences not faced by males, the court held that the legislature is not constitutionally compelled to hold the female victims equally culpable with the male perpetrators (Pet. App. A-6). The court further explained that "the Legislature may well have believed that the criminal prosecution of a minor female equally with a male would, as a practical matter, effectively eliminate any possibility whatever of prosecution under the statute" and that "[b]ecause the Legislature has enacted this legislation with the principal objective of protecting minor females as a class it is not surprising that it simultaneously elected to exclude the victim herself from the statutory

proscription" (Pet. App. A-7). In addition, the court pointed out that California law as a whole adequately protects all minors from sexual abuse (citing Cal. Penal Code §§ 272, 288 (West 1973)), and that "[w]omen may be prosecuted under these statutes if they engage in sexual relations with underage males" (*id.* at A-6). Thus, "Section 261.5 merely provides additional protection for minor females in recognition of the demonstrably greater injury, physical and emotional, which they may suffer" (*id.* at A-7).[3]

Three judges dissented, concluding that Section 261.5 was designed to protect women's virtue, not to avoid teenage pregnancies (Pet. App. A-9 to A-17). The dissenting opinion suggested that the statutory antecedents of the current California statute were based on an anachronistic view of women and that there was no reason to believe that the California legislature had a different purpose in mind when it amended and recodified the unlawful sexual intercourse provision in 1970 (*id.* at A-12 to A-16 & n.2). Therefore, in the dissenters' view, the statute cannot be upheld on the pregnancy rationale proffered by the State (*id.* at A-17). The dissenting opinion further states that even if Section 261.5 were actually intended to prevent pregnancy, it is still unconstitutionally underinclusive because it fails to penalize equally culpable females.

SUMMARY OF ARGUMENT

Section 261.5 of the California Penal Code (West Supp. 1979) prohibits a male from having sexual intercourse with a female not his wife, if she is under the age of 18. However, a female who has sexual intercourse with an

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[3] The court also concluded (Pet. App. A-7 to A-8) that Section 261.5 does not denigrate a female's capacity to make intelligent choices, but rather is no different from a variety of statutes that restrict minors from engaging in certain kinds of potentially dangerous activities regardless of how well informed or intelligent the minor might be.

underage male does not violate Section 261.5, although she may well run afoul of other provisions of California's broad statutory scheme proscribing the sexual abuse and exploitation of all minors. In other words, Section 261.5 classifies on the basis of gender, protecting only young females, punishing only male sex offenders. The question presented by this case is whether that classification offends the Equal Protection Clause.

Not all laws that classify on the basis of gender are unconstitutional. To be sure, such a classification must be substantially related to the achievement of important governmental objectives. But, consistent with the Equal Protection Clause, a statute may remedy past gender discrimination. See, *e.g.*, *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 653 (1975); *Califano* v. *Webster*, 430 U.S. 313 (1977); *Kahn* v. *Shevin*, 416 U.S. 351 (1974). Or, where men and women are otherwise not similarly situated, a legislature may treat them differently on a non-invidious basis. See, *e.g.*, *Parham* v. *Hughes*, 441 U.S. 347 (1979); *Califano* v. *Webster*, *supra*; *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975).

This case involves one of what we believe is a quite small class of situations in which a legislature may justifiably differentiate between men and women. Undisputed biological facts establish that young men and young women are not similarly situated as to the problems and risks of sexual intercourse. Women alone can become pregnant, and they alone must face the physical and psychological dangers of childbearing or abortion. In addition, sexual intercourse poses serious physical problems for prepubescent females not shared by prepubescent males. Furthermore, because of their physiological differences, women and not men are the victims of forcible heterosexual rape—a problem that statutory rape provisions ameliorate. In sum, Section 261.5 provides for

the special problems of young women based on noninvidious biological distinctions between males and females.

Petitioner nonetheless contends that the sole purpose of Section 261.5 is to preserve women's chastity. But the highest court of the State has rejected this claim, holding that Section 261.5 is valid because it serves the purpose of preventing teenage pregnancies. That determination is entitled to great deference, particularly where, as here, the legislature has subsequently acquiesced in the court's ruling. Furthermore, the language of Section 261.5 and the policy and intent of the California legislature evinced in other legislation demonstrate that the prevention of pregnancy and the prevention of physical harm to female minors are the primary purposes underlying Section 261.5.

This case has an unusual aspect that distinguishes it from the vast majority of "statutory rape" cases. Here petitioner is also underage, and the question thus arises whether the statute is constitutional as applied to a defendant who is a minor. Even assuming that Section 261.5 could not constitutionally be invoked to punish only the male of an equally culpable teenage love couple, it is not clear that petitioner has standing to raise that challenge. As it now stands, the record in this case indicates that petitioner was the aggressor and that his victim did not voluntarily agree to have sexual intercourse. See, *e.g.*, *United States* v. *Raines*, 362 U.S. 17, 21 (1960). In any event, we do not believe that Section 261.5 should be held invalid even as applied to equally culpable males and females. Because men and women are not similarly situated as to the risks and dangers of sexual intercourse, a legislature could constitutionally choose to impose a sanction only on men, who would otherwise lack any substantial deterrent.

ARGUMENT

THE CALIFORNIA UNLAWFUL SEXUAL INTERCOURSE STATUTE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

This case poses the narrow question whether California's unlawful sexual intercourse statute unconstitutionally discriminates on the basis of gender. California, like a number of states, territories, and the federal government,[4] has enacted a gender-based "statutory rape" provision. See Cal. Penal Code § 261.5 (West Supp. 1979). Section 261.5 prohibits a male from having sexual intercourse with a female not his wife, if she is under the age of 18. Although a female having sexual intercourse with an underage male may well run afoul of various other California penal provisions (see pages 10-11, *infra*), she does not violate Section 261.5. Consistent with the overwhelming weight of authority,[5] the court

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[4] See 18 U.S.C. 1153, 2032; Ala. Code §§ 13-1-133, 13-1-134 (1979); C.Z. Code tit. 6, § 2221(1) (1963); Del. Code Ann. tit. 11, § 762(a) (1979); D.C. Code Ann. § 22-2801 (Supp. I 1974); Ga. Code Ann. § 26-2018 (1978); Idaho Code § 18-6101(1) (1979); La. Rev. Stat. Ann. § 14.80(1) (West Supp. 1980); N.Y. Penal Code §§ 130.25(2), 130.30, 130.35(3) (McKinney 1975); Okl. Stat. tit. 21, §§ 1111(1)-(2), 1112 (1958); Or. Rev. Stat. § 163.375 (1979); 1974 P.R. Sess. Laws, Act No. 115, Art. 99(a) (1974); Tex. Penal Code Ann. § 21.09 (Vernon Supp. 1980); Va. Code §§ 18.2-61, 18.2-63 (Supp. 1979); V.I. Code Ann. tit. 14, §§ 1702-1703 (1964 & Supp. 1978).

[5] Although this Court has never directly addressed this issue, two members of the Court have previously concluded that gender-based statutory rape provisions are clearly constitutional. See *Helgemoe* v. *Meloon*, 436 U.S. 950 (1978) (the Chief Justice and Mr. Justice Blackmun). In addition, the lower federal courts and state courts have almost uniformly concluded that such provisions are constitutional. See, *e.g.*, *Rundlett* v. *Oliver*, 607 F.2d 495 (1st Cir. 1979); *Hall* v. *McKenzie*, 537 F.2d 1232 (4th Cir. 1976); *Hall* v. *State*, 365 So.2d 1249, 1252-1253 (Ala. Crim. App. 1978), cert. denied, 365 So.2d 1253 (1979); *State* v. *Gray*, 122 Ariz. 445, 595

below concluded that a state may constitutionally limit the protection afforded by a statutory rape provision only to underage women because sexual intercourse poses serious physical problems for young women not faced by young men. We submit that the decision of the Supreme Court of California is correct.

The principal importance of this case—and our main concern—is the facial validity of this discrimination based on the gender of the underage participant in the act of sexual intercourse. This case also presents a subsidiary issue of the validity of the statute as applied, which arises by virtue of the fact (extremely unusual in these cases) that petitioner himself was also underage. We discuss this subsidiary issue in the last section of this brief (pages 24-25, *infra*).

P.2d 990, 991-992 (1979); *People* v. *Mackey*, 46 Cal. App. 3d 755, 760-761, 120 Cal. Rptr. 157, 160 (4th Dist.), cert. denied, 423 U.S. 951 (1975); *People* v. *Salinas*, 191 Colo. 171, 551 P.2d 703 (1976); *State* v. *Brothers*, 384 A.2d 402 (Del. Super. Ct. 1978); *In re W.E.P.*, 318 A.2d 286, 289-290 (D.C. 1974); *Barnes* v. *State*, 244 Ga. 302, 303-304, 260 S.E. 2d 40, 41-42 (1979); *State* v. *Drake*, 219 N.W.2d 492, 495-496 (Iowa 1974); *State* v. *Bell*, 377 So.2d 303 (La. 1979); *State* v. *Rundlett*, 391 A.2d 815 (Me. 1978); *Green* v. *State*, 270 So.2d 695 (Miss. 1972); *In re J.D.G.*, 498 S.W.2d 786, 792-793 (Mo. 1973); *State* v. *Meloon*, 116 N.H. 669, 366 A.2d 1176 (1976); *State* v. *Thompson*, 162 N.J. Super. 302, 392 A.2d 678 (1978); *People* v. *Mndange-Pfupfu*, 411 N.Y.S. 2d 1000, 97 Misc. 2d 496 (Tompkins City Ct. 1978); *State* v. *Wilson*, 296 N.C. 298, 311-313, 250 S.E.2d 621, 629-630 (1979); *Olson* v. *State*, 588 P.2d 1018 (Nev. 1979); *State* v. *Elmore*, 24 Or. App. 651, 546 P.2d 1117 (1976); *Roe* v. *State*, 584 S.W.2d 257, 259 (Tenn. Crim. App. 1979); *Ex parte Groves*, 571 S.W.2d 888, 892-893 (Tex. Crim. App. 1978); *Moore* v. *McKenzie*, 236 S.E.2d 342-343 (W.Va. 1977); *Flores* v. *State*, 69 Wisc. 2d 509, 510-511, 230 N.W.2d 637, 638 (1975). Contra, *United States* v. *Hicks*, No. 78-2534 (9th Cir. Apr. 16, 1980) (the government is currently considering whether to file a petition for a writ of certiorari in this case); *Meloon* v. *Helgemoe*, 564 F.2d 602 (1st Cir. 1977), cert. denied, 436 U.S. 950 (1978) (limited in *Rundlett* v. *Oliver*, *supra*).

Code §§ 286(b)(1) (sodomy), 288a(b)(1) (oral copulation).[7] See also Cal. Penal Code §§ 311.2(b), 311.4 (West Supp. 1977) (prohibiting child pornography and similar commercial exploitation).[8]

In sum, Section 261.5 is merely part of a broad statutory scheme designed to protect all minors in California from sexual exploitation and the risks and problems caused by sexual activities involving adolescents. Of course, unlike the other gender-neutral provisions discussed above, Section 261.5 creates an additional measure of protection solely for young females, essentially between the ages of 14 and 17.[9] The question thus posed is whether the biological differences between the sexes justify that distinction.

B. The Constitution Does Not Prohibit Gender Classifications That Are Substantially Related To The Achievement Of Important Governmental Purposes

The Court has had difficulty in agreeing upon the proper approach and analysis in gender discrimination cases.[10] Nonetheless, it is now well settled that "a State

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[7] The statutes provide for a range of penalties depending upon the ages of the child and perpetrator. See Cal. Penal Code §§ 286(b)(2) & (c), 288a(b)(2) & (c) (West Supp. 1979).

[8] Likewise, the federal criminal code prohibits the sexual exploitation of both young males and young females. See Pub. L. No. 95-225, Section 2, 92 Stat. 7 (to be codified at 18 U.S.C. 2251 *et seq.*) (child pornography prohibited); 18 U.S.C. 13, 1153 (assimilating state laws).

[9] Both males and females under the age of 14 are fully covered by Section 288, which provides for a greater penalty than does Section 261.5. Compare Cal. Penal Code § 288 (West Supp. 1979) with Cal. Penal Code §§ 264, 18 (West Supp. 1979).

[10] See *Craig* v. *Boren*, 429 U.S. 190, 210 n.* (1976) (Powell, J. concurring). These differences are manifested in the multiple opinions rendered by the Court in many of the recent equal protection cases involving gender classifications. See, *e.g.*, *Parham* v. *Hughes*, 441 U.S. 347 (1979); *Caban* v. *Mohammed*, 441 U.S. 380 (1979); *Califano* v. *Goldfarb*, 430 U.S. 199 (1977); *Craig* v. *Boren*, *supra*.

is not free to make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class." *Parham* v. *Hughes*, 441 U.S. 347, 354 (1979) (plurality opinion). See, *e.g.*, *Califano* v. *Westcott*, 443 U.S. 76, 89 (1979); *Craig* v. *Boren*, 429 U.S. 190, 197 (1976); *Frontiero* v. *Richardson*, 411 U.S. 677, 690 (1973). Hence, a statute may not be predicated on archaic assumptions and outdated misconceptions about the social or economic roles of the sexes. See, *e.g.*, *Wengler* v. *Druggists Mutual Insurance Co.*, No. 79-381 (Apr. 22, 1980); *Orr* v. *Orr*, 440 U.S. 268 (1979); *Califano* v. *Goldfarb*, 430 U.S. 199 (1977); *Stanton* v. *Stanton*, 421 U.S. 7, 14-15 (1975); *Frontiero* v. *Richardson*, *supra*. Nor may a legislature stigmatize one sex or the other. See, *e.g.*, *Caban* v. *Mohammed*, 441 U.S. 380 (1979); *Craig* v. *Boren*, *supra*; *Reed* v. *Reed*, 404 U.S. 71 (1971).

It does not follow, however, that all laws that treat one sex differently from the other are invariably invalid. So long as the gender classification in question is substantially related to the achievement of important government objectives, the legislature is free to act. See, *e.g.*, *Wengler* v. *Druggists Mutual Insurance Co.*, *supra*, slip op. 8; *Califano* v. *Westcott*, *supra*, 443 U.S. at 89; *Orr* v. *Orr*, *supra*, 440 U.S. at 279; *Califano* v. *Webster*, 430 U.S. 313, 316-317 (1977); *Craig* v. *Boren*, *supra*, 429 U.S. at 197. Accordingly, Congress or a state legislature may enact appropriately tailored provisions "to provide for the special problems of women." *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 653 (1975). See *Califano* v. *Webster*, *supra*; *Kahn* v. *Shevin*, 416 U.S. 351 (1974); *Frontiero* v. *Richardson*, *supra*, 411 U.S. at 689 n.22. See also *Fullilove* v. *Klutznick*, No. 78-1001 (July 2, 1980). Moreover, the Court has repeatedly upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances. See *Par-*

ham v. *Hughes*, *supra*; *Califano* v. *Webster*, *supra*; *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Kahn* v. *Shevin*, *supra*. Cf. *Geduldig* v. *Aiello*, 417 U.S. 484, 496 n.20 (1974).

Although none of the Court's plenary decisions in this area govern the unique question raised here,[11] the principles briefly outlined above compel the conclusion that Section 261.5 is constitutional. As we demonstrate below, young men and women are not similarly situated as to the risks and dangers of sexual intercourse. Accordingly, the legislature's decision to afford young women extra protection against risks that they alone face does not offend the Equal Protection Clause. See note 4, *supra*.

C. Section 261.5 Furthers Important Governmental Interests In Deterring Illegitimate Teenage Pregnancies And Preventing Injuries To Prepubescent Females

1. A state has broad authority to protect the physical, mental, and moral well-being of its youth. Because "minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," "the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences." *Bellotti* v. *Baird*, 443 U.S. 622, 635 (1979) (plurality opinion). See, *e.g.*, *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. 52, 72-74 (1976); *Ginsberg* v. *New York*, 390 U.S. 629, 639-641 (1968).

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[11] Only *Craig* v. *Boren* concerned a criminal provision. But in that case the gender classification was based on insubstantial if not "perverse" distinctions between young men and women. See 429 U.S. at 199-204; *id.* at 212-213 & n.4 (Stevens, J., concurring). Here, in contrast, there is no dispute that, because of the different physical characteristics of men and women, sexual intercourse is more dangerous and problematic for young women than for young men.

We note that the Court has in the past summarily upheld the constitutionality of criminal provisions that afford additional protection to females. See *Buchanan* v. *State*, 480 S.W.2d 207 (Tex. Crim. App.), appeal dismissed for want of a substantial federal question, 409 U.S. 814 (1972).

Because sexual intercourse and the concomitant problems of pregnancy and abortion involve such "important affirmative choices with potentially serious consequences," the legislature may prohibit unemancipated minors from engaging in sexual intercourse, at least on a gender-neutral basis. See *Carey* v. *Population Services International*, 431 U.S. 678, 692, 702-703 (1977) (White, J., concurring); *id.* at 705-707, 709 (Powell, J., concurring); *id.* at 713 (Stevens, J., concurring); *id.* at 718 n.2 (Rehnquist, J., dissenting); *Ginsberg* v. *New York*, *supra*. Cf. *Doe* v. *Commonwealth's Attorney*, 425 U.S 901 (1976).[12]

As the court below concluded (Pet. App. A-2 to A-5), young men and young women are not similarly situated with regard to the problems and risks of sexual intercourse. See *Planned Parenthood of Missouri* v. *Danforth*, *supra*, 428 U.S. at 71. Only women can become pregnant, and the problems for young women associated with illegitimate teenage pregnancies are enormous. In 1978, more than 220,000 live births occurred to unmarried females under 18 years of age. National Center for Health Statistics (HEW), *Advance Report: Final Natality Statistics 1977*, 27 Monthly Vital Statistics Report No. 11, Table 2 (Supp. Feb. 5, 1979); Alan Guttmacher Institute, *11 Million Teenagers* 11 (1976). See also

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[12] We do not understand petitioner to contend otherwise. But cf. Br. 22-23. We further note that the assumption that minors need protection from themselves appears grounded in reality. See Zelnick & Kantner, *Sexual And Contraceptive Experience of Young Unmarried Women In The United States, 1976 and 1971*, 8 Family Planning Perspectives 58-68 (1977); Zabin, Kantner & Zelnick, *The Risk Of Adolescent Pregnancy In The First Months of Intercourse*, 11 Family Planning Perspectives 215 (1979); Edwards, Steinman, Arnold & Hakanson, *Adolescent Pregnancy Prevention Services In High School Clinics*, 12 Family Planning Perspectives 6 (1980). While the nation's birthrate has been declining, and despite the availability of contraceptives and sex education, pregnancy rates for young women are increasing. See Alan Guttmacher Institute, *11 Million Teenagers* 12 (1976); see generally C. Chilman, *Adolescent Sexuality In A Changing American Society* (NIH Pub. No. 80-1426, 1980).

Pub. L. No. 95-626, Section 601, 92 Stat. 3595 (to be codified at 42 U.S.C. 300a-21). Moreover, teenage women, who are more likely to delay seeking an abortion until the second trimester, when the physical risks are greater, are involved in approximately one third of all abortions nationwide. See Fielding, *Adolescent Pregnancy Revisited*, 299 New England J. of Med. 893 (1973); *11 Million Teenagers, supra*, at 10. And the mortality rates and other health risks for both mother and child are greatly increased where teenage mothers are concerned. See, *e.g.*, Bennett & Bardon, *The Effects Of a School Program On Teenage Mothers And Their Children*, 47 Am. J. of Orthopsychiatry 671 (1977); *Adolescent Pregnancy Revisited, supra*, 299 New England J. of Med. at 894; *11 Million Teenagers, supra*, at 23; F. Nye, *School-Age Parenthood* 4 (Wash. State U. Extension Bull. No. 667, 1977).[13]

Likewise, there are equally dramatic biological distinctions between prepubescent males and females. Very young males may be physiologically incapable of sexual intercourse,[14] and the act of coitus does not, in any event, pose serious physical risks for sexually immature males. In contrast, because of their anatomical structure, young females may engage in sexual intercourse regardless of

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[13] In addition to the physical aspects of pregnancy and/or abortion that young women alone must face, they also suffer substantial social costs not generally suffered by young men. Empirical data demonstrate that most young pregnant girls fail to complete high school and accordingly are thereafter disadvantaged economically. See, *e.g.*, Phipps-Yonas, *Teenage Pregnancy and Motherhood*, 50 Am.J. of Orthopsychiatry 403, 414 (1980); Moore, *Teenage Childbirth and Welfare Dependency*, 10 Family Planning Perspectives 233-235 (1978); *11 Million Teenagers, supra*, at 5. As a result of these and other traumas associated with early motherhood, suicide rates for teenage mothers are seven times greater than the rate applicable to teenage girls without children. *School-Age Parenthood, supra*, at 8 (nine percent of teenage mothers attempt suicide).

[14] To be sure, young males are in need of protection from other forms of sexual exploitation, but California provides such protection. See pages 10-11, *supra*.

their age or size. Furthermore, such activity often produces serious gynecological injuries for sexually immature females, including increased risk of cervical cancer. See, *e.g.*, *Barnes* v. *State*, 244 Ga. 302, 260 S.E.2d 40, 42 (1979); Orr & Prieto, *Emergency Management of Sexually Abused Children*, 133 Am. J. of Diseases of Children 630 (1979); Jaffe, Dynneson & ten Bensel, *Sexual Abuse of Children*, 129 Am. J. of Diseases of Children 689, 690-691 (1975); C. Chilman, *Adolescent Sexuality In A Changing American Society* 146 (NIH Pub. No. 80-1426, 1980).[15] In short, sexual intercourse poses substantial physical risks for prepubescent females not faced by their male counterparts. See also Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis For Equal Rights For Women*, 80 Yale L.J. 871, 957-961 (1971).[16]

Furthermore, petitioner ignores the fact that carnal knowledge statutes serve to facilitate the prosecution of forcible rapes involving young victims.[17] Prosecutions for rape result in a far lower proportion of convictions than those for any other violent crime, regardless of the age of the victim. See K. Williams, *The Prosecution Of*

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[15] Likewise, deep psychological effects often accompany early sexual intercourse. S. Brownmiller, *Against Our Will* 279 (1975); E. Hilberman, *The Rape Victim* 50-51 (1976); Kempe, *Sexual Abuse, Another Hidden Pediatric Problem*, 62 Pediatrics 382, 386 (1978).

[16] As discussed above, Section 261.5 essentially focuses on women aged 14 to 17. See page 11, *supra*. Insofar as persons in that age group may be prepubescent and insofar as Section 261.5 is viewed in isolation from the other provisions of the California Penal Code, the distinctions between prepubescent males and females are pertinent.

[17] Almost one-third of the victims of forcible rapes are under 18 years of age and approximately 20 percent are less than 12 years of age. See R. Geiser, *Hidden Victims* 20 (1979); K. Williams, *The Prosecution Of Sexual Assaults* 6-7 (Inst. for Law and Social Research Pub. No. 7, 1978); National Inst. of Law Enforcement and Crim. Justice, U.S. Dept. of Justice, *Forcible Rape: Final Project Report* 17 (1978).

Sexual Assaults 26 (Inst. for Law and Social Research Pub. No. 7, 1978). The difficulties in proving forcible rape, including proof of lack of consent, are compounded where the victim is a young child, particularly since in many instances child rape will involve various forms of psychological pressure and trickery as well as outright violence. See, *e.g.*, R. Geiser, *Hidden Victims* 34-35 (1979); S. Brownmiller, *Against Our Will* 278 (1975).[18] Moreover, it is evident that the potential trauma for the prosecutrix in a forcible rape case, where consent is often a critical issue and where the character and sexual history of the prosecutrix is often material to the case, far exceeds that attendant upon trial of a statutory rape charge. And again, young men and young women simply are not similarly situated as to problem of forcible rape because of their immutable biological differences. See Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1, 48-49 (1977).

In sum, even assuming that females engage underage males in sexual intercourse as often as males have sexual intercourse with underage females,[19] girls face serious

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[18] The majority of reported decisions in statutory rape cases, like the preliminary hearing evidence in this case, show that intercourse was achieved by use of some form of force or threats. See, *e.g.*, *United States* v. *Sangrey*, 586 F.2d 1312 (9th Cir. 1978); *Hall* v. *State*, *supra*; *Barnes* v. *State*, *supra*; *In re Interest of J.D.G.*, *supra*; *State* v. *Drake*, *supra*. But where, as here, the evidence also shows that the victim had voluntarily drunk with petitioner and engaged in moderate sexual activity with him, it is extremely difficult to obtain a conviction for forcible rape even though the defendant's conduct may clearly violate the rape statutes. See K. Williams, *The Prosecution of Sexual Assaults*, *supra*, at 31-33.

[19] See *Caban* v. *Mohammed*, *supra*, 441 U.S. at 404 n.8 (Stevens, J., dissenting). In fact, however, the empirical evidence overwhelmingly demonstrates that sexual assaults on young females are a far greater problem than sexual assaults on young males. See, *e.g.*, *State* v. *Craig*, 169 Mont. 150, 545 P.2d 649, 653 (1976); *Emergency Management of Sexually Abused Children*, *supra*, 133 Am. J. of Diseases of Children 629-630; *Sexual Abuse of Children*, *supra*, 129 Am. J. of Diseases of Children 690; *The Prosecution of*

risks and dangers that boys do not. As the result of indisputable biological differences, females and males are therefore "*not* similarly situated" with regard to the problems of adolescent sexual intercourse, which Section 261.5 is designed to prevent. See, *e.g.*, *Schlesinger* v. *Ballard*, *supra*, 419 U.S. at 508; *Parham* v. *Hughes*, *supra*, 441 U.S. at 354. Because the additional protections afforded only to women by a criminal statute like Section 261.5 thus "provide for the special problems of women" (*Weinberger* v. *Wiesenfeld*, *supra*, 420 U.S. at 653), gender-based carnal knowledge provisions do not violate the Equal Protection Clause. See, *e.g.*, *Buchanan* v. *Texas*, 480 S.W.2d 207 (Crim. App. Tex.), dismissed for want of substantial federal question, 409 U.S. 814 (1972); *Rundlett* v. *Oliver*, 607 F.2d 495, 498-502 (1st Cir. 1979); *State* v. *Gray*, 122 Ariz. 445, 595 P.2d 990, 991-992 (1979); *Barnes* v. *State*, *supra*; *State* v. *Rundlett*, 391 A.2d 815 (Me. 1978). See also note 4, *supra*.

2. Petitioner concedes (Br. 20) that "the prevention of teenage pregnancy is a compelling interest in every state." He contends, however, that the purpose of the statute is not to prevent pregnancies or other injuries to young females but rather to protect "female chastity" and "the virtue of young women" (Br. 8-10, 24-27). In addition, he argues (Br. 18-24) that even if the statute were intended to prevent pregnancy, it is impermissibly

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Sexual Assaults, *supra*, at 6-7; Sarafino, *An Estimate of Nationwide Incidence of Sexual Offenses Against Children*, LVIII Child Welfare 127, 131 (1979). Furthermore, the data strongly indicate that virtually all attacks on young men involve sodomy or other acts by male aggressors—a problem simply not addressed by a gender-neutral carnal knowledge provision. See, *e.g.*, *Hidden Victims*, *supra*, at 14, 23, 75. And "[e]ven in this context, the well-established concept that a legislature may take one step at a time to remedy only part of a broader problem is not without relevance. See *Dandridge* v. *Williams*, 397 U.S. 471 (1970); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955)." *Fullilove* v. *Klutznick*, No. 78-1007 (July 2, 1980) (plurality opinion).

overinclusive because it covers various acts of adolescent sexual intercourse that may not result in pregnancy. We address these claims in turn.

a. Petitioner argues that the "true" purpose of Section 261.5 is to ensure the chastity of young women. But "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968). See also *Harris* v. *McCrae*, No. 79-1268 (June 30, 1980), slip op. 19-20; *Stephenson* v. *Binford*, 287 U.S. 251, 276 (1932). For example, in *Kahn* v. *Shevin*, *supra*, the Court readily assumed that a Florida tax provision first enacted in 1885 was not based on romantic paternalism but was appropriately designed to ameliorate the past effects of gender-discrimination—a virtually nonexistent concept in 1885. See *Califano* v. *Goldfarb*, *supra*, 430 U.S. at 223-224 (Stevens, J., concurring). Cf. *Craig* v. *Boren*, *supra*, 429 U.S. at 199-200 & n.7. And whatever may be the limits on this principle of deference to the legislative process (see also *Fullilove* v. *Klutznick*, *supra*, slip op. 20-21), here the highest court of the state has concluded that the prevention of pregnancy is a compelling governmental interest that supports Section 261.5 (Pet. App. A-2 to A-4). That determination is entitled to great deference, and should be rejected, if at all, only if an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation. See, *e.g.*, *Weinberger* v. *Wiesenfeld*, *supra*, 420 U.S. at 648 n.16; *Reitman* v. *Mulkey*, 387 U.S. 369, 373-374 (1967); *McGowan* v. *Maryland*, 366 U.S. 420, 449 (1961); cf. *Vance* v. *Bradley*, 440 U.S. 93, 111 (1979).[20] Petitioner's argument falls far short of the mark.

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[20] As petitioner points out (Pet. 9) the California Supreme Court long ago suggested that an "obvious purpose" of a predecessor statute to Section 261.5 was the "protection of society by protecting the virtue of young and unsophisticated girls * * *," as well as the

First, we note that the language of the statute is wholly inconsistent with petitioner's claim. If female chastity were the sole concern of the California legislature, then California would have included a defense based on the unchaste state of the underage female, as several other states have done.[21] The California legislature has refused to provide such a defense despite a judicial suggestion to do so (see *People* v. *Hernandez*, 61 Cal. 2d 529, 531-532 & n.1, 393 P.2d 673, 674-675 & n.1 (1964)), 39 Cal. Rptr. 361, 362-363 & n.1, and it is therefore apparent that teenage pregnancy and other problems rather than chastity are the concerns of Section 261.5. See *State* v. *Rundlett*, *supra*, 391 A.2d at 820 "[t]he objective of the Maine and Massachusetts lawmaking bodies to prevent pregnancy in young females through their statutory rape laws is manifested by the refusal of both states to follow the lead of other jurisdictions in making the prior chasity of the prosecutrix an element of the offense." [22]

Furthermore, petitioner's contention regarding the purpose of Section 261.5 is premised on the unreasonable

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"prevention of * * * the principal act [*i.e.*, sexual intercourse]," quoting *People* v. *Verdegreen*, 106 Cal. 211, 214, 39 P. 607, 608-609 (1895). Such mixed motivations would not render the act invalid. See *United States* v. *O'Brien*, *supra*; *Stephenson* v. *Binford*, *supra*. More important, the critical question here is not the purpose of an earlier version of the act, but the legislature's purpose in amending the act on several subsequent occasions, including 1970. See *McGowan* v. *Maryland*, 366 U.S. 420, 431, 446-449 (1961). And as to that question, "the relevant pronouncements of the [California Supreme Court] dispel any argument that the statute['s] announced purpose is [the preservation of female chastity]." *Id.* at 449.

[21] See, *e.g.*, Fla. Stat. §§ 794.011, 794.05 (1976 & Supp. 1979); Miss. Code Ann. §§ 97-3-65, 97-3-67 (1972).

[22] The federal carnal knowledge statutes also do not provide a defense based on lack of chastity. See 18 U.S.C. 1153, 2032. The legislative history of those provisions, albeit sparse, demonstrates that Congress sought to protect young females from the dangers of sexual intercourse regardless of their chastity. See 19 Cong. Rec. 6501 (1888); 20 Cong. Rec. 997 (1889).

and unsubstantiated assumption that the California legislature, in amending and recodifying its unlawful intercourse statute in 1970,[23] was motivated solely by discredited nineteenth century ideas and was entirely unconcerned with the problems of child abuse and teenage pregnancies. Compare *Kahn* v. *Shevin*, *supra*. To the contrary, however, even prior to 1970, the legislature had expressly recognized that rape, including statutory rape, causes unwanted pregnancies, and it therefore provided that physicians in California may perform abortions on rape and incest victims. See Cal. Health and Safety Code §§ 25951-25952 (West Supp. 1980) (codifying 1967 Cal. Stats. ch. 327, § 1).[24] See also Cal. Welfare & Inst. Code § 16145 (West Supp. 1979) ("The legislature finds that pregnancy among unmarried persons under 21 years of age constitutes an increasing social problem in the State of California"); Cal. Civil Code §§ 34.5-34.9 (West Supp. 1980) (unemancipated minors do not need parental consent for medical treatment regarding pregnancy and rape); Cal. Welfare and Inst. Code § 14503 (West Supp. 1980) (family planning services available to all persons regardless of age or marital status).[25] Finally, subsequent to the decision below, the California legislature considered and rejected proposals to render Section 261.5 gender-neutral, thereby implicitly ratifying the judgment of the California Supreme Court. Cal. Assembly Bill No. 1588, 1979-1980 Cal. Reg. Legis. Sess. (1980); Cal. Sen. Bill

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[23] 1970 Cal. Stats. ch. 1301, § 2; Pet. App. A-16 n.2.

[24] A statutory rape victim under the age of 15 is entitled to such an abortion on demand without reference to the procedures normally entailed in the abortion process in California. See Cal. Health and Safety Code § 25952(c) (West Supp. 1980); Leavy & Charles, *Therapeutic Abortion Act: An Analysis and Guide to Medical and Legal Procedure*, 15 U.C.L.A. L. Rev. 1, 12-22 (1967).

[25] These declarations of California policy illuminate the purpose of Section 261.5. See *Fullilove* v. *Klutznick*, *supra*, slip op. 7-8 (Powell, J., concurring); *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, No. 78-1651 (Feb. 20, 1980).

No. 2045, 1979-1980 Cal. Reg. Legis. Sess. (1980). See, *e.g.*, *Board of Education* v. *Harris*, 444 U.S. 130, 148-149 (1979); *People* v. *Hallner*, 43 Cal. 2d 715, 719, 277 P.2d 393, 396 (1954).[26]

b. Petitioner further claims (Br. 24) that "Section 261.5 is colossally overinclusive." In particular, he argues that the statute is overbroad insofar as it covers prepubescent females, who are, by definition, incapable of becoming pregnant. But even assuming that petitioner has standing to challenge the breadth of Section 261.5,[27] there is no merit to petitioner's claim. We have already demonstrated that prepubescent males and females are not similarly situated with regard to the risks of sexual

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[26] We are aware of no relevant legislative history regarding Section 261.5. A state legislature need not, of course, compile "the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Fullilove* v. *Klutznick*, *supra*, slip op. 26. See also *id.* at 7-8 (Powell, J., concurring); *id.* at 4 n.4 (Marshall, J., concurring). Moreover, the dearth of legislative history is hardly surprising. Section 261.5 is a state criminal provision with ancient origins (see Statute of Westminster I, 1275, 3 Edw. 1, c.13 (1 Stat. 83)) that is designed to prevent obvious problems for young women arising out of sexual intercourse.

Petitioner nonetheless claims that because the original version of Section 261.5 applied only to girls under 10, the statute was obviously intended to protect chastity and not to prevent pregnancies (Pet. App. A-18). That fact, however, strongly suggests that the original statute was intended to protect prepubescent females from physical harms not suffered by young males. See pages 15-16, *supra*. In any event, the relevant question is the legislature's purpose in increasing the age limit of the statute so that, by 1970, it effectively covered only females between the ages of 14 and 17.

[27] There is no allegation that Sharon, who was 16 at the time of the incident, was prepubescent or otherwise infertile at that time. It is therefore doubtful whether petitioner can challenge the statute because it might be unconstitutional as applied to another victim. See *United States* v. *Raines*, 362 U.S. 17, 21 (1960); *United States* v. *Green*, 554 F.2d 372, 375 (9th Cir. 1977); *United States* v. *Garrett*, 521 F.2d 444, 446 (8th Cir. 1975).

intercourse. Thus, the statute constitutionally extends protection only to young females based on their greater physical needs. Moreover, since Section 288 of the California Penal Code prohibits any lewd or lascivious act involving any minor under the age of 14, the effective scope of Section 261.5 is females between the ages of 14 and 17. See pages 11, 16 n.16, *supra*. Because the overwhelming majority of females in that age group are capable of childbirth, Section 261.5 is substantially related to the prevention of illegitimate teenage pregnancies.

Petitioner also erroneously contends (Br. 18-19) that the statute is unconstitutional because it does not provide for a defense based on the use of contraceptives. This claim is not related to gender at all. Rather, as petitioner himself recognizes (Br. 19), his allegation is that the statute is irrational insofar as it treats males who use contraceptives the same as it treats "irresponsible" males.[28] Such a claim would be equally applicable to a gender-neutral statute, and it therefore is properly evaluated under the "mere rationality" standard and not the "substantial relationship" standard applied in gender discrimination cases. Cf. *Harris* v. *McRae*, *supra*, slip op. 22-24. And there can be no question that the omission of a contraceptives defense from the unlawful sexual intercourse statute is not wholly irrational.

In fact, even adjudged under the more exacting standard, it is apparent that the lack of a "contraceptives" defense does not render Section 261.5 invalid. See *Kahn* v. *Shevin*, *supra*, 416 U.S. at 356 n.10. Such a defense would entail impossible problems of proof in an area already fraught with prosecutorial difficulties. See generally K. Williams, *The Prosecution of Sexual Assaults*, *supra*; Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1 (1977). Furthermore, as the court below correctly pointed out (Pet. App. A-6), no contraceptive is completely failsafe.

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[28] Petitioner does not allege that he used a contraceptive.

record does not presently indicate the applicability of that description to petitioner himself, petitioner's claim is at a minimum, premature. See, *e.g.*, *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 380 (1977); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973); *United States* v. *Raines*, 362 U.S. 17, 21 (1960); *United States* v. *Green*, 554 F.2d 372, 375 (9th Cir. 1977); *United States* v. *Garrett*, 521 F.2d 444, 446 (8th Cir. 1975).[30]

In any event, Section 261.5 is not unconstitutional even if it is viewed as imposing greater sanctions on underage males than on underage females.[31] Men and women are not similarly situated as to the risks and problems of sexual intercourse. The risks of pregnancy and attendant problems themselves constitute a substantial deterrence to young females. No similar natural sanctions deter young males, and the available evidence indicates that the abolescent male generally disregards the risk of pregnancy. See, *e.g.*, Phipps-Yonas, *Teenage Pregnancy and Motherhood*, *supra*, 50 Am. J. of Orthopsychiatry at 412. Accordingly, the legislature could constitutionally provide that only males need be punished and that females, who ordinarily are in fact the victims in carnal knowledge prosecutions, need not.

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[30] Indeed, difficulty of discovery of the offense and the normal exercise of prosecutorial discretion make it unlikely that there will be many prosecutions of the male partner in a teenage love couple. For this reason, it seems unnecessary for this Court to concern itself now with the proper disposition of such a hypothetical case.

[31] An underage female who is either more culpable than or equally culpable with her male lover may be prosecuted as a juvenile delinquent. Cal. Welfare and Inst. Code § 602 (West 1972 & Supp. 1980); see *In re Gladys R.*, 1 Cal.3d 855, 867-869, 464 P.2d 127, 136-138, 83 Cal. Rptr. 671, 680-682 (1970).

CONCLUSION

The judgment of the Supreme Court of California should be affirmed.

Respectfully submitted.

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SEPTEMBER 1980

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